Superior Court of the State of Delaware

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April 23, 2014

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Re: Thomas and Janet Dillulio v. Jacob D. Reece, et al. Civil Action No. K12C-04-021 WLW

Dear Counsel,

Before the Court is a case in which communication breakdowns between counsel resulted in the filing of Plaintiffs' motion *in limine* to preclude the testimony of Defendants' expert witness. This Court had already granted Plaintiffs' motion in a prior letter order decision. After Defendants indicated in their motion for reargument that the Court had potentially misapprehended key facts, the Court granted that motion and requested further filings from the parties in order to reconsider Plaintiffs' original motion. The Court has carefully considered the filings of the parties, relevant legal authority, and the positions iterated by counsel at the pretrial conference. Plaintiffs' motion to preclude expert testimony is **DENIED**, but sanctions shall still be imposed on Defendants for their failure to participate in the discovery process in a timely and responsive manner. This letter decision expands upon the reasons mentioned at the pretrial conference.

BACKGROUND

This is a negligence action filed by Plaintiffs Thomas and Janet Dillulio (collectively "Plaintiffs") against Defendants Jacob Reece, Tri-State Grouting, L.L.C., and Tri-State Grouting, Inc. (collectively "Defendants"). On October 2, 2012 this

Court issued a Scheduling Order which set the cutoff date for Defendants' expert discovery as December 10, 2013. The deadline for motions *in limine*, including *Daubert* motions, was March 18, 2014, and the deadline for responses to motions was April 1, 2014. Trial is currently set for May 12, 2014.

Plaintiffs submitted interrogatories and requests for production to Defendants on June 19, 2012. On November 20, 2012 Plaintiffs' counsel mailed a letter to Defendants' counsel requesting a response to the formerly submitted discovery. Defendants ultimately never responded to the discovery requests or the letter. At the pretrial conference, Defendants' counsel acknowledged he did not respond to Plaintiffs' discovery, and indicated he may have been under a mistaken impression that he did not have to respond based on conversations with Plaintiffs' counsel. Plaintiffs' counsel stated he could not remember any conversation excusing Defendants' lack of response, and pointed out that he had sent the November 20 letter specifically requesting responses. Defendants' counsel did not acknowledge receiving the letter. Despite not receiving any responses, Plaintiffs' counsel never filed a motion to compel discovery.

On June 11, 2013, Defendants mailed Plaintiffs notice of a defense medical examination of Plaintiff Thomas Dillulio. The letter stated that the examination would be performed by Dr. Richard Katz (hereinafter "Dr. Katz"). The examination was conducted on August 1, 2013. Aside from the June 11 letter, Defendants provided no written disclosure of Dr. Katz as their expert witness prior to the December 10, 2013 cutoff date.

Dr. Katz prepared a report based on the examination, and Defendants' counsel directed his office staff to mail copies of the report to Plaintiffs' counsel. Plaintiffs' counsel claims he never received the report. Defendants' counsel claims he never had any reason to believe the report had not been received, because he was never contacted by Plaintiffs' counsel about not receiving Dr. Katz's report.

Mediation was held on March 11, 2014. For the first time, Defendants' counsel learned that Plaintiffs' counsel never received Dr. Katz's report. Defendants' counsel immediately provided Plaintiffs' counsel a copy of the report at the mediation. Seven

days later, on March 18, 2014—the motion *in limine* deadline—Plaintiffs filed a motion seeking to: (1) preclude Defendants from offering any testimony at trial or any documentary evidence based on Defendants' failure to respond to Plaintiffs' 2012 discovery requests; and (2) exclude any expert testimony offered by Defendants at trial due to Defendants' failure to identify experts prior to the cutoff date under the Scheduling Order. The Court notes that Plaintiffs' original motion does not mention the June 11, 2013 examination letter, the March 11, 2014 mediation, or the fact that Plaintiffs' counsel received Dr. Katz's report at the mediation.

Also on March 18, Defendants' counsel filed a letter with the Court indicating counsel's intent to file a *Daubert* motion once Plaintiffs' experts were deposed or a *Daubert* hearing was scheduled. Plaintiffs' counsel subsequently filed a letter to the Court indicating that no agreement to extend the motion deadline had been reached by counsel, and informed the Court that any such motion filed by Defendants would be opposed as untimely.

On March 24, 2014, Defendants noticed the video trial deposition of Dr. Katz. On March 27, 2014, Plaintiffs counsel filed another letter with the Court in which he reiterated the same representations and arguments made in the March 18 motion *in limine*. Plaintiffs' counsel requested that the Court issue a ruling on the March 18 motion prior to the deposition of Dr. Katz in order to determine whether or not the deposition would go forward. As with the March 18 motion, counsel made no mention of Defendants' medical examination letter on June 11, 2013 nor of the March 11, 2014 mediation. Defendants still had not filed any response to the March 18 motion at this time.

On April 1, 2014—the deadline for responses to motions, and still with no response from Defendants to either the March 18 motion or the March 27 letter—the Court issued a letter order decision granting Plaintiffs' motion in part as to exclude the testimony of Dr. Katz.¹ The Court based its decision on Defendants' failure to

¹ Dillulio v. Reece, C.A. No. K12C-04-021 WLW, at *3 (Del. Super. Apr. 1, 2014).

timely disclose Dr. Katz as an expert prior to the December 10, 2013 cutoff date.² The Court denied Plaintiffs' motion in part as to allow Defendants to present testimony and documentary evidence at trial.³ The Court entered and e-filed the decision at 1:52 p.m.

Defendants filed their opposition to Plaintiffs' motion *in limine* at 7:19 p.m. on April 1-more than five hours after the Court had already issued its decision. Defendants argued that they timely sent Plaintiffs the notice of the medical examination on June 11, 2013 in which Dr. Katz was named. Defendants also contended that Dr. Katz's report was timely issued and sent to Plaintiffs' counsel following the August 1 examination, and that the March 11, 2014 mediation was the first time Defendants learned that Plaintiffs never received Dr. Katz's report, which prompted Defendants to promptly provide the report to Plaintiffs' counsel. Defendants' opposition was the first filing by the parties to inform the Court of the examination notice, the examination report, and the events at the mediation.

The next day, on April 2, 2014 Defendants filed a motion for reargument. Defendants reiterated the above representations, and stressed that there was no reason to believe that Plaintiffs' counsel had not received Dr. Katz's report. Defendants also argued that when Plaintiffs received the report on March 2, 2014, there was still ample time to respond to the report, and thus there was no prejudice to Plaintiffs as a result of their late receipt of the report. Defendants also argued that under the Delaware Supreme Court's holdings in *Drejka v. Hitchens Tire Service, Inc.*⁴ and *Christian v. Counseling Resource Associates, Inc.*⁵, preclusion of expert testimony under these circumstances would be inappropriate. In their response to the motion, Plaintiffs acknowledged that Plaintiffs' counsel received a copy of Dr. Katz's report at the mediation on March 11, 2014. Plaintiffs argued that Defendants failed to

 $^{^{2}}$ *Id.* at *2-3.

³ *Id.* at *3.

⁴ 15 A.3d 1221 (Del. 2010).

⁵ 60 A.3d 1083 (Del. 2013).

timely disclose Dr. Katz as an expert, because the June 2013 examination notice did not constitute an expert witness disclosure.

By Order dated April 7, 2014, this Court granted Defendants' motion for reargument in part in regards to Plaintiffs' motion to preclude the testimony of Dr. Katz.⁶ The Court found it difficult to reconcile the parties' contrasting accounts of how the discovery process unfolded.⁷ The Court concluded that if it had known of the June 2013 examination notice, Defendants' attempt to mail Dr. Katz's examination report to Plaintiffs, and Plaintiffs' receipt of Dr. Katz's report at the March 2014 mediation, the outcome of the Court's April 1 letter decision would have been different.⁸ The Court also held that the attempt of Defendants' counsel to unilaterally extend the cutoff date for *Daubert* motions by filing a letter expressing intent to file a motion in the future was unsuccessful, and informed counsel that any future *Daubert* motion would be dismissed outright as untimely unless Plaintiffs' counsel agreed to the late filing, and the Court was notified of this consent.⁹ The Court solicited letters from counsel to provide the Court with their accounts of the discovery process and argument on their respective positions with regards to Plaintiffs' motion to preclude the testimony of Dr. Katz.¹⁰

The parties submitted their letters to the Court on April 14, 2014; neither filing offered much in the way of new information regarding the discovery process. Defendants argued that the June 2013 examination letter put Plaintiffs on notice that Dr. Katz would be called as an expert witness well before the discovery cutoff date. Defendants described the failed mailing of Dr. Katz's report to Plaintiffs as a "breakdown" but argued that such breakdown should not result in the preclusion of

⁶ Dillulio v. Reece, C.A. No. K12C-04-021 WLW, at *11 (Del. Super. Apr. 7, 2014).

⁷ *Id.* at *9.

⁸ *Id*.

⁹ *Id.* at 8 n.11.

¹⁰ *Id.* at 10-11.

Dr. Katz's testimony. Plaintiffs argue that a written disclosure of expert witnesses is required under the Scheduling Order, and that the June 13 letter was insufficient to qualify as a disclosure of Dr. Katz as an expert witness. Plaintiffs further argue that while the analysis of *Drejka* and *Christian* applies to the circumstances of the instant case, such analysis favors precluding the testimony of Dr. Katz.

Finally, the Court heard further argument from counsel at the pretrial conference held on April 15, 2014. Defendant's counsel pointed out that under the Rules of Civil Procedure for the State of Delaware, Civil Rule 35 requires the party who conducts a medical examination to send the other party an examination report, and thus Plaintiffs' counsel should have made some effort to follow up with the defense when no report was forthcoming. It was also brought to the Court's attention by counsel that the special damages being sought by Plaintiffs are "significant" in that they number in the six-figures range. The Court was previously unaware of the large amount of special damages from the previous filings or the Pretrial Stipulation. Also discussed at the conference was the likelihood that the trial date of May 12, 2014 would be continued due to Defendants' counsel's involvement in another matter that is also scheduled for trial that week.

DISCUSSION

The trial judge has "discretion to resolve scheduling issues and to control its own docket." Pursuant to Superior Court Civil Rule 16, parties must follow the trial judge's scheduling order and conduct discovery "in an orderly fashion." If a party fails to obey a scheduling order, the Court has discretion to impose appropriate

¹¹ This is not entirely accurate. Rule 35 requires the examining party to provide the other party with the examination report "[i]f requested" by the other party. Del. Super. Ct. Civ. R. 35(b). It remains unclear whether Plaintiffs' counsel in fact requested a copy of Dr. Katz's report. In practice, it is expected that the report will be sent to the opposing party.

¹² Sammons v. Doctors for Emergency Servs., P.A., 913 A.2d 519, 528 (Del. 2006) (citing Coleman v. PricewaterhouseCoopers, LLC, 902 A.2d 1102, 1107 (Del. 2006)).

¹³ *Id*.

sanctions.¹⁴ A decision to impose discovery sanctions depends on the particular facts and circumstances of each case; the decision must be "just and reasonable" and the sanction must be specifically tailored to the discovery violation and its prompt cure.¹⁵ Dismissal of a noncompliant party's claim is viewed as the ultimate discovery sanction, and given its severity dismissal is rarely ordered except as a last resort.¹⁶ As described by the Supreme Court in *Drejka*, in determining whether dismissal is an appropriate sanction, the Court balances six factors: (1) the extent of the party's personal responsibility; (2) the prejudice to the adversary caused by the failure to meet scheduling orders and respond to discovery; (3) any history of dilatoriness; (4) whether the attorney's conduct was willful or in bad faith; (5) the effectiveness of alternative sanctions; and (6) the meritoriousness of the claim or defense."¹⁷

In the recent case of *Christian*, the Supreme Court applied the *Drejka* factors when the trial court dismissed a case after informal extensions of discovery deadlines, as agreed to by the parties without the trial court's involvement, resulted in a request for a trial continuance that the trial court was unwilling to give. The Supreme Court concluded that dismissal was inappropriate, and further advised that if litigants "act without court approval, they do so at their own risk." In "practice guidelines" at the end of the *Christian* opinion, the Court advised that if one party misses a discovery deadline, opposing counsel may choose to "*promptly* notify the court" via a motion to compel, proposal to amend the scheduling order, or a request for the conference. 20

¹⁴ *Drejka*, 15 A.3d at 1223-24 (citing Del. Super. Ct. Civ. R. 16(f)).

¹⁵ In re Rinehardt, 575 A.2d 1079, 1082 (Del. 1990) (citations omitted).

¹⁶ *Drejka*, 15 A.3d at 1224 (citing *Hoag v. Amex Assurance Co.*, 953 A.2d 713, 717 (Del. 2008)).

¹⁷ Id. (citing Minna v. Energy Coal S.p.A., 984 A.2d 1210, 1215 (Del. 2009)).

¹⁸ Christian, 60 A.3d at 1087-88.

¹⁹ *Id.* at 1088.

²⁰ *Id.* (emphasis added).

Doing so would enable the trial court to "take whatever steps are necessary to resolve the problem in a timely fashion." The party may also choose to attempt to resolve the matter informally without the trial court's involvement, but doing so "waive[s] the right to contest any late filings by opposing counsel from that time forward" because the party accepts the risk of being prejudiced by any delayed filing "by failing to promptly alert the trial court when the first discovery deadline passes."

The Court rejects Defendants' argument that the June 2013 medical examination notice constituted an expert disclosure sufficient to satisfy the Scheduling Order. Nowhere does the letter mention that Dr. Katz would be testifying as a defense expert; the letter merely states that Dr. Katz would be performing the examination. Defendants essentially ask this Court to hold that whenever a medical examination is noticed, the other party should assume that the examining physician will be testifying at trial as an expert witness. Such a proposition is absurd, as Plaintiffs correctly point out that attorneys regular retain consulting experts as part of the discovery process with no intention of ever calling the experts as trial witnesses. In the future, only explicit written disclosure of a party's expert witnesses will be considered to be satisfactory under this Court's scheduling orders.

Thus, the June 2013 letter noticing the defense medical examination does not constitute a disclosure of Defendants' expert witnesses. It follows that the examination report itself would also not constitute a sufficient disclosure. The Court notes that it remains unclear as to what exactly transpired with the disclosure of the examination report; the reason for why the report failed to reach Plaintiffs' counsel may never be known. The Court shall proceed under the assumption that Plaintiffs' counsel did not have notice of the report until March 11, 2014 at the mediation.

Because Defendants did not timely disclose Dr. Katz as a defense expert witness prior to the Scheduling Order's cutoff date of December 10, 2013, sanctions are appropriate. Sanctions are also appropriate for the failure of Defendants' counsel

²¹ *Id*.

²² *Id*.

to respond to Plaintiffs' 2012 interrogatories and requests for production. Defendants suggest—and Plaintiffs agree—that *Drejka* and *Christian* provides the appropriate framework for determining whether the preclusion of Dr. Katz's testimony is an appropriate sanction. The Court does not believe that those cases are exactly on point, as both cases involved a plaintiff's failure to comply with discovery and dismissal of the plaintiff's case as a sanction—*i.e.*, the plaintiff's entire case was at stake.²³

Here, it is the defendant who has failed to comply with this Court's Scheduling Order, and the Defendants' entire case is not at stake. Accordingly, the Court is loathe to hold that a balancing of the *Drejka* factors is necessary in every instance where a party's expert witness is at risk of being excluded on the basis of failure to comply with a scheduling order, as the *Drejka* analysis seems geared towards those cases where only the "ultimate sanction" of dismissal is implicated. The more general "just and reasonable" discretionary determination should be enough in this case.

Nonetheless, as both parties agree that *Drejka* provides an appropriate framework for determining this case, the Court shall assume without deciding that *Drejka* applies in determining whether Dr. Katz should be precluded from testifying. The first *Drejka* factor favors Defendants, as the named Defendants bear no personal responsibility whatsoever for the conduct of their attorney. The second factor–prejudice to the adversary–also tips in favor of Defendants. As indicated by the *Christian* Court's practice guidelines, a party's failure to promptly alert and involve the trial court when faced with an opponent's discovery violation hampers the trial court's ability to resolve the matter in a timely fashion. Following Defendants' initial discovery violations in 2012, Plaintiffs failed to promptly involve the Court, and chose not to file any motion to compel discovery. As to the untimely disclosure of Dr. Katz, the mere fact that Plaintiffs were seeking a significant amount of special damages should have created *some* expectation that Defendants would call an expert witness. While Plaintiffs' counsel should not be faulted for perhaps placing faith in Defendants' counsel that responses would ultimately be delivered or any

²³ Christian, 60 A.3d at 1086; Drejka, 15 A.3d at 1222.

expert would have been disclosed prior to the deadline, Plaintiffs' counsel should have taken some prompt action to involve the Court when no responses or disclosure seemed forthcoming. Thus, to the extent there is prejudice, some of it is attributable to the failure of Plaintiffs' counsel to take prompt action. Further, as indicated at the pretrial conference, it is likely that this trial date will be continued to give Plaintiffs' counsel ample time to prepare for Dr. Katz's testimony. Based on the foregoing, any prejudice to Plaintiffs if Dr. Katz is allowed to testify would be minimal.

The third factor–history of dilatoriness–favors Plaintiffs, albeit slightly. The fourth factor favors Defendants, as there is nothing to indicate that Defendants' counsel's conduct was willful or done in bad faith. The fifth factor–effectiveness of alternative sanctions–also favors Defendants. In this opinion as well as the Court's previous letter decision and Order granting the motion for reargument, the Court has made it clear to Defendants that the noncommunicative and dilatory conduct displayed over the course of this litigation will not be countenanced in the future. The intended purposes of discovery sanctions include punishment, deterrence or coercion. The first two of these purposes will be served by precluding Defendants from recovering the costs of fees incurred in this litigation, in the event that Defendants prevail at trial. Had Plaintiffs involved the Court earlier, such as when the initial violations occurred in 2012, the sanction might very well be more severe, and the instant motion might have been unnecessary. Precluding Defendants from recovering fees should sufficiently punish Defendants' counsel for his conduct and deter any such conduct in the future.

The sixth *Drejka* factor, meritoriousness of the defense, also favors Defendants, as both parties indicated that Dr. Katz's testimony is important as to the issue of special damages, which total in the six-figure range in this case. Thus, the balance of the *Drejka* factors weigh against precluding Dr. Katz's testimony. Even if the Court did not apply *Drejka* in this case, the result would remain the same, as it would be neither just nor reasonable to preclude Dr. Katz's testimony based on the particular facts and circumstances of this case.

²⁴ Rinehardt, 575 A.2d at 1082 (citing Reeves v. Travelers Ins. Co., 421 A.2d 47, 50 (Me. 1980)).

Based on the foregoing, Dr. Katz shall be permitted to testify at trial. However, his testimony must be limited to the opinions set forth in his examination report.

One final matter must be addressed. In the Pretrial Stipulation, under other matters deemed appropriate by the parties, Defendants reference the March 18 letter regarding *Daubert* motions and state: "a Court ruling will be required as to the admissibility of the testimony of certain or all of the Plaintiffs' experts as a result of a lack of foundation as contemplated in *Daubert*." No such ruling will be forthcoming. The Court shall reiterate what it stated in footnote 11 of its April 7 Order: Defendants failed to formally seek an extension of the filing deadline, thus any presumption that the Court will accept untimely motions is misplaced. A filing deadline cannot be unilaterally extended, without approval of the Court or consent by the other party, simply by filing a letter expressing intent to file a motion in the future. Any *Daubert* motion will be rejected as untimely, unless the opposing party consents to the late filing, and notice of the consent to the late filing is given to the Court.

CONCLUSION

Plaintiffs' motion to preclude the expert testimony of Dr. Katz is **DENIED.** Dr. Katz shall be permitted to testify, but his testimony shall be restricted to the scope of his August 1 examination report. As a sanction for Defendants' failure to respond to Plaintiffs' 2012 discovery requests and their failure to timely disclose Dr. Katz's identity under the Scheduling Order, Defendants are precluded from recovering the costs of any fees in this litigation. Further, Defendants are prohibited from filing any future *Daubert* motion unless opposing counsel agrees and the Court is provided notice of the parties' consent to the late filing.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
Resident Judge

WLW/dmh